



Advertising and Marketing in a Mobile World:

Regulatory Requirements and FTC Guidance

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Federal Trade Commission

Disclaimer

My comments reflect my own views and do not necessarily reflect the views of the Commission or any individual Commissioner.

Contents

- Native Advertising
- Influencer Marketing
- Disclosures on Mobile Devices
- Privacy

Applicable Law

- The FTC Act prohibits deceptive and unfair acts and practices in commerce.
- The same rules that apply in other forums or on other devices apply to mobile devices.

FTC Background

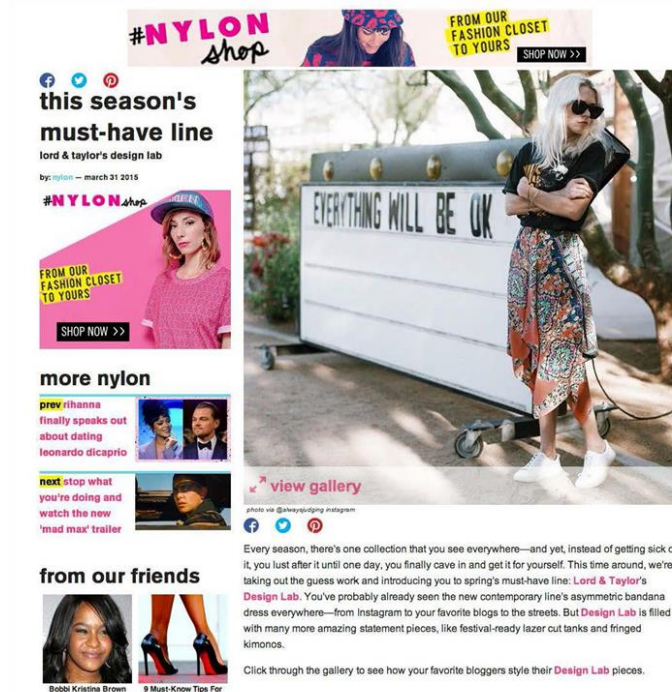
FTC Act (15 U.S.C. §§ 41-58, as amended)

- Prohibits unfair or deceptive acts or practices.
 - Unfairness
 - Acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.
 - Deception
 - A material representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.

Native Advertising

“The Commission will find an advertisement deceptive if the ad misleads consumers as to its nature or source, including that a party other than the sponsoring advertiser is its source. Misleading representations of this kind are likely to affect consumers’ decisions or conduct regarding the advertised product or the advertisement, including causing consumers to give greater credence to advertising claims or to interact with advertising content with which they otherwise would not have interacted.” Commission Enforcement Policy Statement on Deceptively Formatted Advertisements, December 22, 2015, available at <https://www.ftc.gov/public-statements/2015/12/commission-enforcement-policy-statement-deceptively-formatted>

Lord & Taylor



#NYLONshop

FROM OUR FASHION CLOSET TO YOURS SHOP NOW >>

this season's must-have line
lord & taylor's design lab
by: nylon — march 31 2015

#NYLONshop

FROM OUR FASHION CLOSET TO YOURS SHOP NOW >>

more nylon

prev **rihanna** finally speaks out about dating leonardo dicaprio

next stop what you're doing and watch the new 'mad max' trailer

view gallery

photos via @shayyeposting instagram

Every season, there's one collection that you see everywhere—and yet, instead of getting sick of it, you just after it until one day, you finally cave in and get it for yourself. This time around, we're taking out the guess work and introducing you to spring's must-have line: **Lord & Taylor's Design Lab**. You've probably already seen the new contemporary line's asymmetric bandana dress everywhere—from Instagram to your favorite blogs to the streets. But **Design Lab** is filled with many more amazing statement pieces, like festival-ready lazer cut tanks and fringed kimonos.

Click through the gallery to see how your favorite bloggers style their **Design Lab** pieces.

Bobbi Kristina Brown 9 Must-Know Tips For

<https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>

Business Education

Native Advertising: A Guide for Business, available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>

Influencers

- An endorsement must reflect the honest opinions, findings, beliefs, or experience of the endorser.
- An endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.
- Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.
- Endorsers also may be liable for false or misleading statements made in the course of their endorsements.

Guides Concerning Use of Endorsements and Testimonials, 16 CFR Ch. 255, available at https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf

Material Connections Between Advertisers and Influencers

- An unexpected relationship between an endorser and an advertiser that could affect the credibility of the endorsement from the perspective of the viewer must be disclosed.
- Examples of such connections include:
 - Seller is compensating endorser;
 - Endorser is an employee or business associate of seller;
 - Endorser is related to seller;
 - Endorser is entered in sweepstakes;
 - Endorser gets free products.

Celebrity Endorsers

- In conventional ads, it's not necessary for an ad to disclose that a celebrity is being paid, because in that context payment would be understood.
- Outside of conventional ads (on talk shows, social networking sites): the relationship with the advertiser should be disclosed when a celebrity talks up a product because payment isn't obvious in that context.

Advertiser's Responsibility

- Ensure “influencers” receive guidance/training about need to ensure statements are truthful/substantiated; and
- Monitor “influencers” and take steps to halt continued publication of deceptive claims when discovered.

Clear & Conspicuous Disclosures

- Disclosures should be unambiguous.
 - Don't use industry jargon, words or phrases that are ambiguous or unfamiliar, unfamiliar icons or abbreviations; and don't rely simply on a company logo or brand name.
- Disclosures should be placed where consumers will look, in the advertising message to which they relate.
- They should stand out so consumers will notice and read (or hear) them.
 - In font size and colors consumers can easily read on screen.

Native Ad Disclosures

- Place disclosures on the main page of a publisher site where consumers will notice them and easily identify the content to which the disclosure applies.
- Place disclosures in front of or above the headline of the native ad.
- If a native ad's focal point is an image or graphic, ad disclosure might need to appear directly on the focal point itself.

Space-Constrained Ads

- Even in space-constrained ads, required disclosures must still be clear and conspicuous.
- For example, if a tweet is paid for, it can start with “Ad:” or “#ad” to inform consumers that they’re seeing an ad.
- #sponsored, #promotion may also be appropriate and effective (but not cryptic abbreviations like #spon or #sp).

What Should the Disclosure Say?

- No mandated language.
- Ad, Advertisement, Paid Advertisement, Sponsored Advertising Content, are all good.
- Promoted or Promoted Stories may be ambiguous.
- Presented by, Brought to You by, Promoted by may not be clear.
- Sponsored (influencers).

The **Do's** and **Don'ts** for Social Media Influencers

FTC RECOMMENDATIONS



Clearly **DISCLOSE** when you have a financial or family relationship with a brand



Ensure your sponsorship disclosure is **HARD TO MISS**

PRACTICES TO AVOID



DON'T ASSUME followers know about all your brand relationships



Don't assume disclosures **BUILT INTO** social media platforms are sufficient



Treat sponsored tags, including tags in pictures, **LIKE ANY OTHER** endorsement



On image-only platforms like Snapchat, **SUPERIMPOSE DISCLOSURES** over the images



Don't use **AMBIGUOUS DISCLOSURES** like "Thanks," #collab, #sp, #spon, or #ambassador



Don't rely on disclosures that people will see only if they **CLICK "MORE"**

Source: Federal Trade Commission

Lord & Taylor



wendyslookbook

Follow

3 weeks ago

Pairing a cropped trench with
spring awakening
and by o's exclusive
hem dress 'Ci Really enjoy seeing how others styled
this vitam piece!

lesfiesue tenun_ruseni.prince se_malgres_elle and
123k others like this.



hafizahadee
Iwam that shoesss 1

M
that's otee
Im
AWESOME ~

wendysundari
i!tJi
cbe_lite_ store



nafiskerondotcom
wendyslookbook it was sue a pleasure to meet you
today Wendy your a purege lets stay connected .

11
fashionfinity12_
I post many omds and design rhandbags pies

.la
sabhe_says
Is not that exclusive.I have seen about a dozen
people style ts on Instagram and many more when I
looked at the hash tag_



Leave a comment...



L&T Influencer Campaign

- Lord & Taylor also recruited a team of 50 fashion influencers.
- Paid them between \$1,000 and \$4,000 to post photos of themselves in the dress on Instagram on one specified weekend in March 2015.
- Coordinated with Nylon postings.
- No disclosures.

Other Recent Influencer Cases

- CSGO Lotto
- Deutsch LA
- Machinima
- Trampoline Safety of America

Influencer Letters

- 90 “education letters” sent to brands and influencers in April 2017
- 21 follow-up warning letters have been sent
- Clearly and conspicuously disclose material connections
- Tagging a brand is an endorsement of the brand
- Requested response by September 30, 2017
- A number of individual warning letters have been sent since

Business Education

- Dot Com Disclosures: Information About Online Disclosures
- <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>
- Guides Concerning the Use of Endorsements and Testimonials in Advertising
- <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>
- The Revised Endorsement Guides: What People Are Asking (FAQs)
- <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking>
- endorsements@ftc.gov

Privacy

- Privacy and data security are a consumer protection priority
 - Enforcement
 - Policy initiatives
 - Consumer education and business outreach

FTC Privacy Cases



Privacy

- Keep your promises made in your privacy policy and terms of service.

Data Security



Data Security

- Take reasonable steps to protect the data you collect

Data Security

- Start with security.
- Control access to data sensibly.
- Require secure passwords and authentication.
- Store sensitive personal information securely and protect it during transmission.
- Segment your network and monitor who's trying to get in and out.
- Secure remote access to your network.
- Apply sound security practices when developing new products.
- Make sure your service providers implement reasonable security measures.
- Put procedures in place to keep your security current and address vulnerabilities that may arise.
- Secure paper, physical media, and devices.

Source: Start with Security: A Guide for Business, available at

<https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>

Resources

- Start with Security, available at <https://www.ftc.gov/tips-advice/business-center/guidance/stick-security-business-blog-series>)
- “App Developers: Start with Security” available at <https://www.ftc.gov/tips-advice/business-center/guidance/app-developers-start-security>
- Complying with the FTC’s Health Breach Notification Rule available at <https://www.ftc.gov/tips-advice/business-center/guidance/complying-ftcs-health-breach-notification-rule>
- Mobile Health App Developers: FTC Best Practices available at <https://www.ftc.gov/tips-advice/business-center/guidance/mobile-health-app-developers-ftc-best-practices>

Contact Information

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ReedSmith

Advertising and Marketing in a Mobile World

2018 FDLI Annual Conference

May 4, 2018

ReedSmith
Driving progress
through partnership

Overview

- Native Advertising
- Influencer Marketing
- Hyperlinking

Native Advertising

- Include necessary context (*i.e.*, disclosures) to help consumers understand the nature or source of the ad
- Questions to ask business partners:
 - Where will this content be placed?
 - Is this placement a part of a media buy? Are we otherwise paying for this placement?
 - How will this content appear to a consumer?
 - Review in-context proofs
- Draw from FTC Guidance:
 - Does “featured” convey to consumers the nature or source of an ad?
 - When in doubt, use “ad,” “paid,” or “sponsored”

Native Advertising

LOL win omg cute trashy fail wtf

Like Follow Follow

BuzzFeed

10 Unconventional Pets You Can Actually Own

PRESENTED BY Skittles

FEATURED PARTNER

Thrillist with GE. Sponsored ·

What the heck is this liquid heat doing to you? #ad

Thrillist Got Together With GE And High

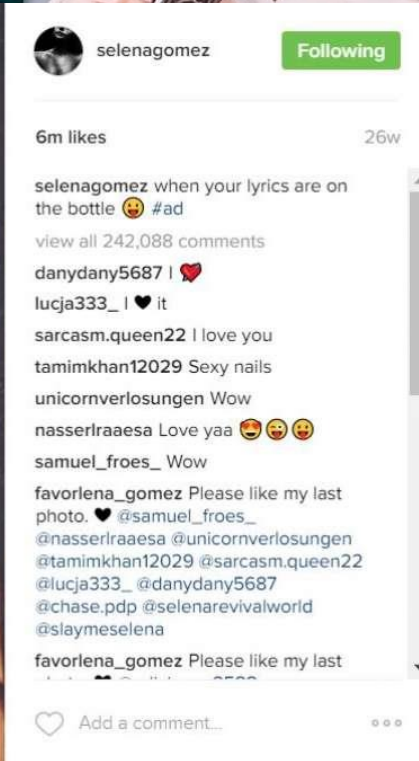
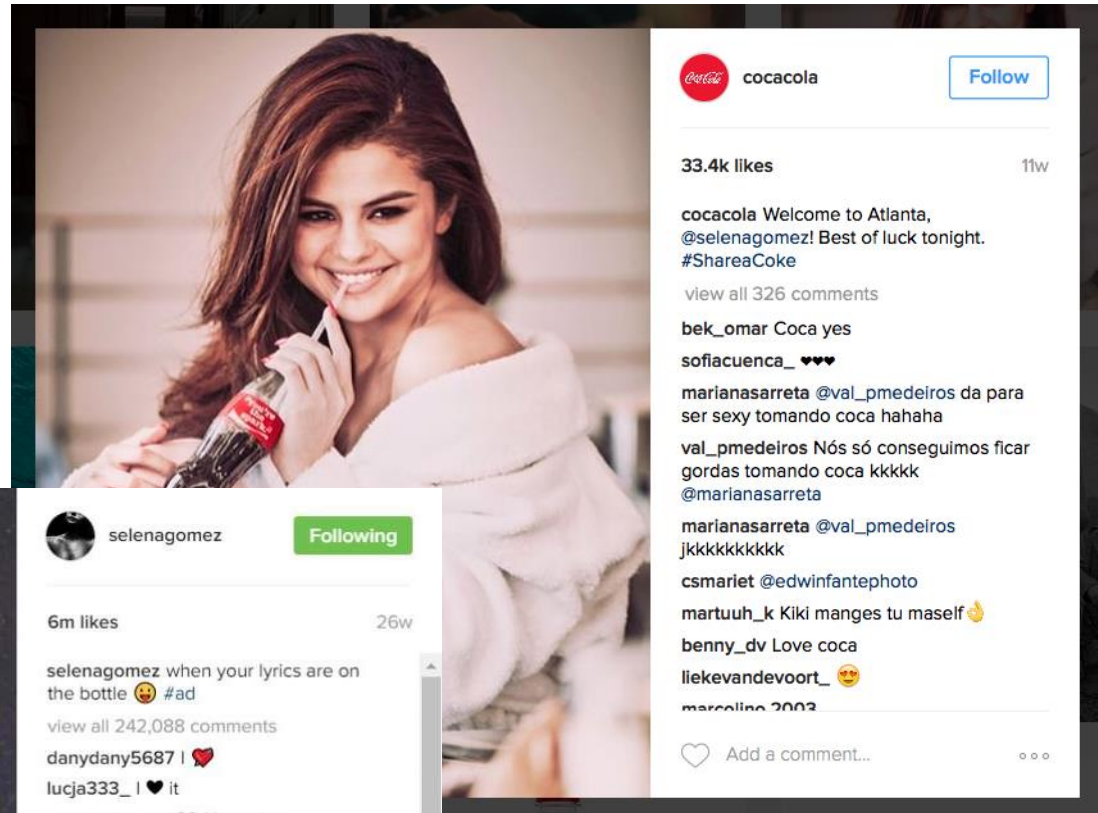
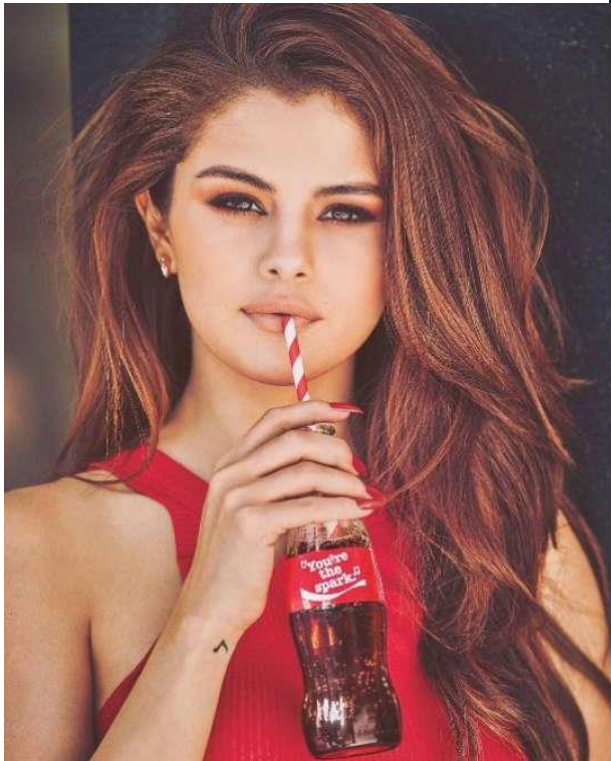
Influencer Marketing

- Train business partners on FTC requirements:
 - Disclosure
 - Truthfulness: opinion/belief/experience, usage, product attributes
 - Moderation
- Screen influencers prior to engagement
 - Internet search
 - Review influencer social channels for prior compliance
- Agreements with influencers:
 - Require specific disclosure(s)
 - Require influencers to submit content, including social copy
 - Specify breach protocol and remedies
 - Include guidelines reiterating FTC requirements: clear/conspicuous

Influencer Marketing

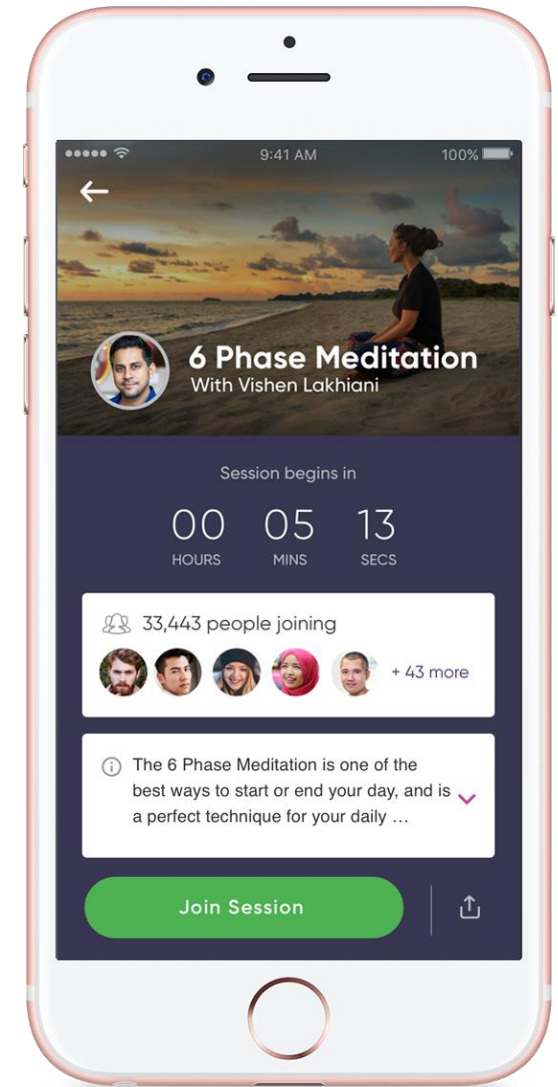
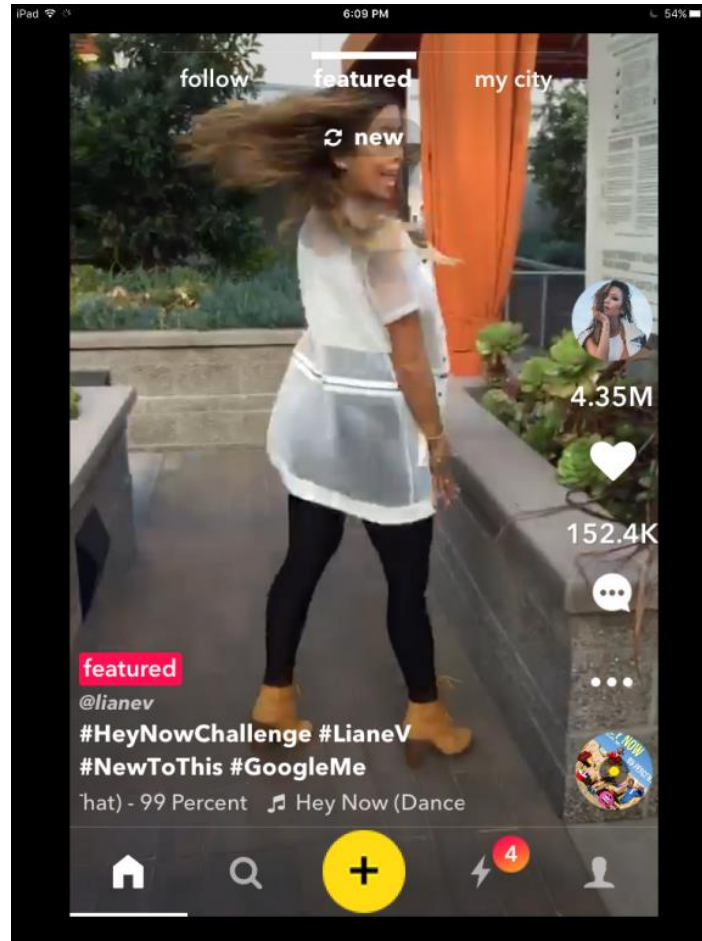
- Do we *really* need to disclose? Isn't it obvious?
 - If the **influencer** is communicating the message →
DISCLOSE
 - If the **advertiser** is communicating the message →
Disclosure may not be necessary

Influencer



Alternative and New Mobile Platforms

- Music.ly
- Pinterest
- Calm
- YouTube



Alternative and New Mobile Platforms

- Request a demonstration of the app to understand the context of the endorsement.
- What does the platform recommend?
- Request wireframes to identify where in the platform and when during the endorsement a disclosure may be viable and necessary.
- When in doubt, embed the disclosure in the content clearly, conspicuously, and closely in connection with the endorsement.

Hyperlinks

- *Additional* (not required) information may be placed on a webpage separate from the relevant claim
- Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink (*i.e.*, health and safety disclosures, significant additional fees etc.)

Tips to effectively hyperlink

- Convey important information and/or the nature of the disclosure as the text of the hyperlink
- Pay attention to consistency and style – make it obvious there is a hyperlink
- Manage placement and prominence – the hyperlink must be noticeable and placed near information it qualifies
- Link directly to the disclosure on the click-through page
- Monitor click-through rates

Disclosures Generally

- ✓ Close to the claims they relate to and not hidden in footnotes or in blocks of text people are not likely to read;
- ✓ **IN A FONT THAT IS EASY TO READ;**
- ✓ In a shade that stands out against the background of the ad and/or platform;
- ✓ For video ads, on the screen long enough to be noticed, read, and understood; and
- ✓ In words consumers will understand.



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Advertising and Marketing in a Mobile World

May 4, 2018

Panel Introductions

- **Dale Cooke**
President, PhillyCooke Consulting
- **Richard Cleland**
Assistant Director, Bureau of Consumer Protection,
Division of Advertising Practices, Federal Trade
Commission
- **Toam Rubinstein,**
Associate, Reed Smith LLP

Audience Profile Q1

What product category do you work on most?

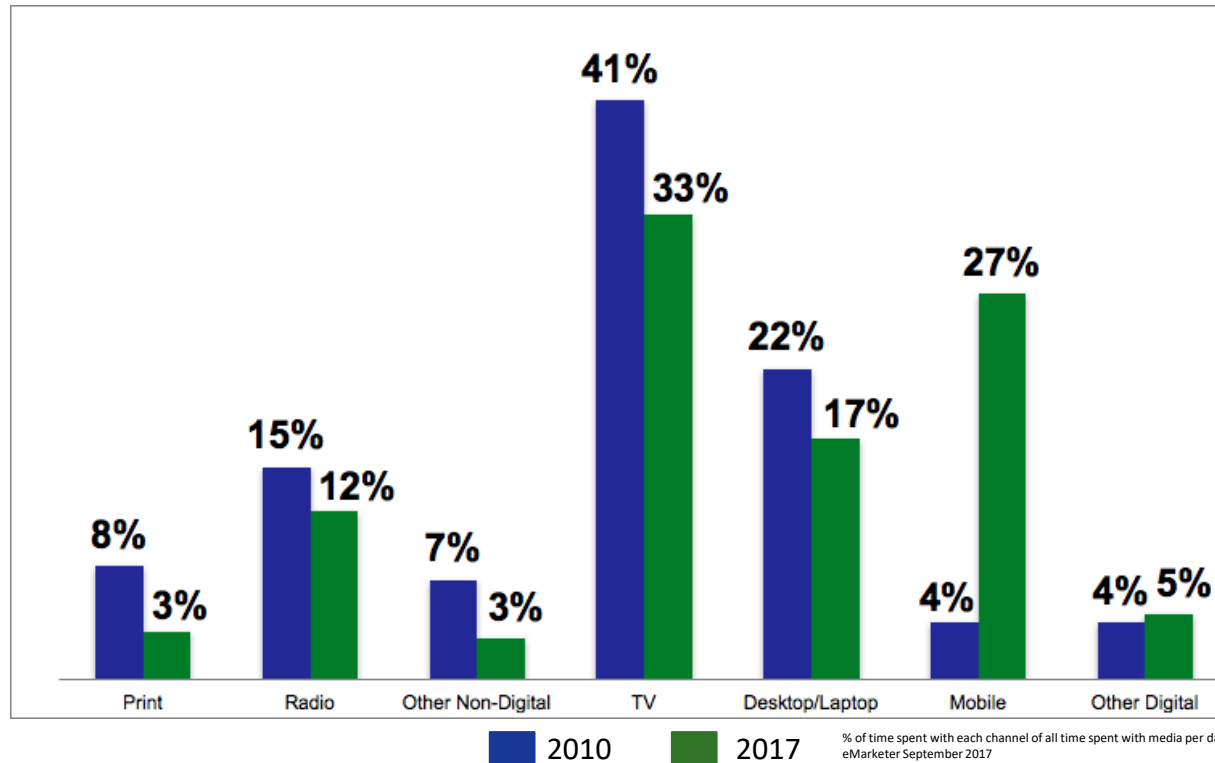
- A. Food
- B. Drugs or biologics
- C. Medical Devices
- D. Tobacco
- E. Dietary Supplements
- F. Cosmetics

Audience Profile Q2

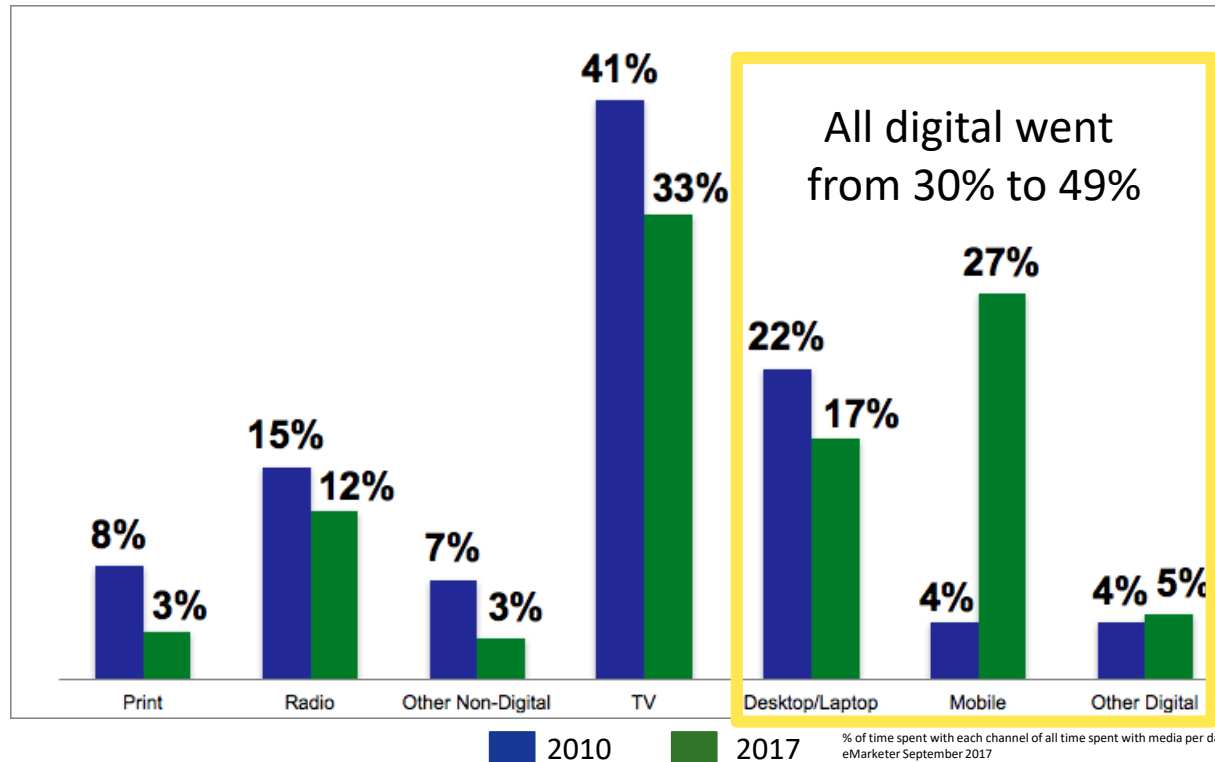
Which of the following best describes your primary role?

- A. General Legal
- B. Marketing Legal
- C. Compliance
- D. Clinical
- E. Government relations/policy

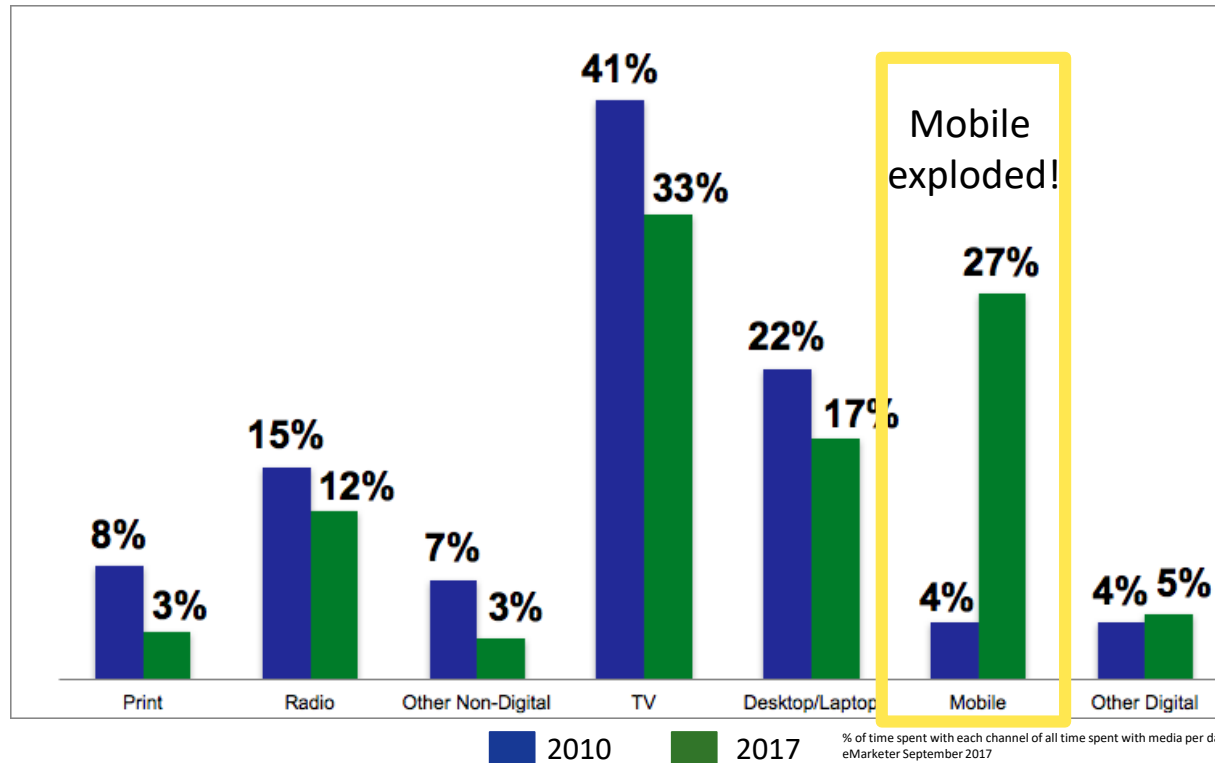
Total Time with Media by Channel



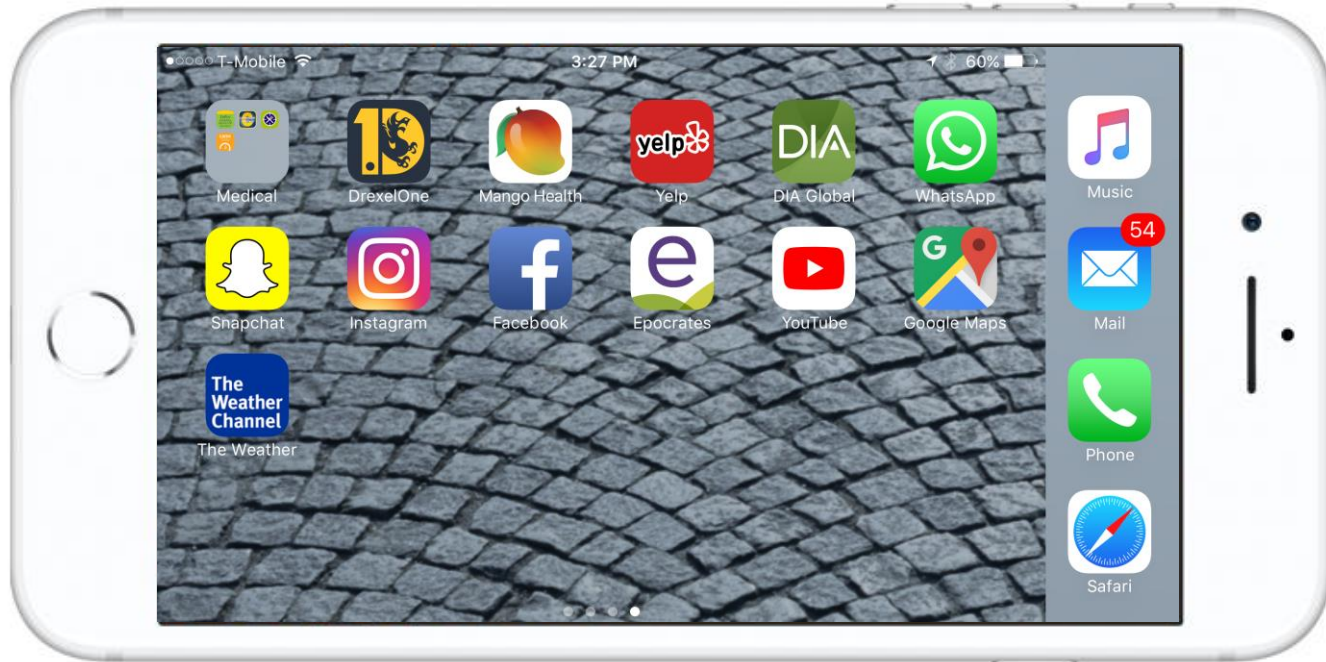
Total Time with Media by Channel



Total Time with Media by Channel



Types of Mobile Communications

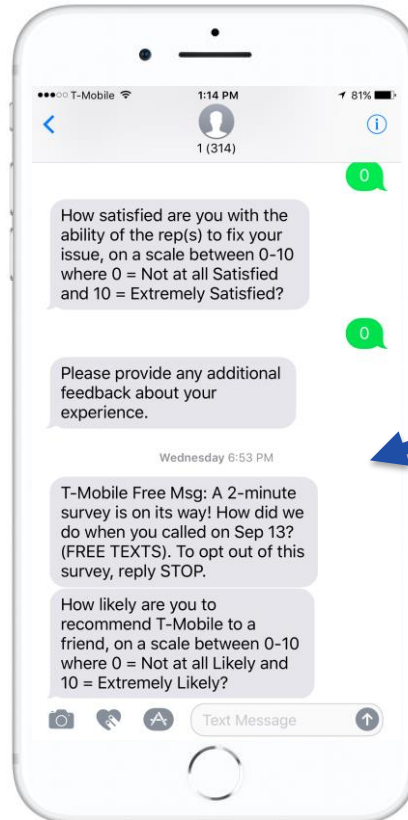


Types of Mobile Communications



Paid promotional
placement in-app

Types of Mobile Communications



Text messaging &
other device capabilities

Recent FDA Mobile Study

- In July 2017, FDA OPDP's social science research team published an article in the *Journal of Medical Internet Research* about mobile communications for **prescription drugs**
- This study was descriptive, i.e., it looked at what companies were actually doing in mobile communications, NOT prescriptive
- The study did not contain any recommendations, guidance, or binding authority about what companies should do
- The study looked at both mobile ads and the landing pages of mobile sites for **prescription drugs**

<http://www.jmir.org/2017/7/e225/>

FDA OPDP Social Science Research Page:

<https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm090276.htm>

Mobile Study Implications

- Although the study itself has no guidance, recommendations, or binding authority on companies, it does show what issues in mobile communications are concerning FDA
- FDA's social science research frequently informs later FDA guidance
- There is no way to know exactly how this study's results will affect future guidance or enforcement
- Reading the article closely indicates where FDA has concerns about current practices for **prescription drug promotion**
- Concerns include:
 - Not displaying risks at the same time as benefits
 - Not displaying risks with the same prominence as benefits
 - Requiring users to scroll to see risk information
 - Requiring users to scroll to see the complete risk information (though the article noted that it such scrolling might be required because of length of risk information)

Upcoming FDA Research

- One-click study affecting space-limited formats (e.g., Twitter & search engine marketing) **prescription drug promotion** requirements
- Revised study design announced August 17, 2017
- Study likely to be fielded in 2018
- Impact on guidance unlikely before 2019 or 2020